# Yip Chee Seng & Sons Sdn Bhd v Ornaconstruction Corp Sdn Bhd

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24—393 OF 1997
AUGUSTINE PAUL JC
7 FEBRUARY 1998

***Arbitration*** *— Agreement — Reference of dispute — Right to arbitration — Termination of agreement — Whether issue of notice of demand amount to waiver of right to arbitration — Application to refer dispute to arbitration — Whether application was an attempt to exert right to enforce arbitration clause and prohibited by s 20(2) of Specific Relief Act 1950*

The plaintiff and the defendant entered into an agreement ('the agreement') for the construction of a golf course. The agreement contained provisions for arbitration and its termination. By a letter dated 21 November 1996, the defendant gave the plaintiff notice of termination of the agreement. The plaintiff accepted the repudiation of the agreement and made a claim against the defendant arising from the termination. The defendant informed the plaintiff that the defendant had substantial claim against the plaintiff for breach of contract. The plaintiff then suggested that a sole arbitrator be appointed to arbitrate the dispute that had arisen between the parties pursuant to cl 14 of the agreement. The defendant informed the plaintiff that the dispute involved legal issues and thus the proper forum to resolve the dispute was a court of law. The plaintiff proceeded with the appointment of an arbitrator. However, the arbitration proceeding was withheld pending clarification of the position. The plaintiff applied to the court for a declaration that it was entitled to refer the dispute to arbitration in accordance with cl 14 of the agreement. The defendant argued, inter alia: (i) once an agreement had been terminated by consent of both parties, they could no longer rely on the terms of the contract; (ii) the plaintiff had waived its right to arbitration by issuing a notice of demand to the defendant which stated that a summon would be issued if the defendant failed to settle the sum demanded; and (iii) the application by the plaintiff was an attempt by it to exert its right to enforce cl 14 of the agreement which was prohibited by s 20(2) of the Specific Relief Act 1950.

**Held**, allowing the application:

(1) The arbitration clause survived for the purpose of measuring the claims arising out of the breach as that was the mode of settling claims agreed by the parties in the event there was a dispute. The language of cl 14 of the agreement was wide enough to cover any form of breach so long as a claim or dispute could be sustained following the breach. The arbitration clause therefore survived for measuring the damages arising by consent in this case, as there was liability in respect of the breach and obligations that had been performed. As a matter of fact, the defendant did not

dispute certain parts of the claim of the plaintiff. Thus, the termination of the agreement did not affect the operation of cl 14 (see p 669D–F); *Heyman & Anor v Darwin Ltd* [1942] AC 356 followed.

(2) The plaintiff had complied with the requirements of s 9 of the Arbitration Act 1952 in the appointment of the sole arbitrator. As there was a challenge to his jurisdiction to hear the dispute, the matter was rightly before the court (see p 670C–D).

(3) An arbitrator is empowered to determine questions of law. A dispute should be heard by a court only if the point of law involved is substantial and complex. In the present case, the points of law were in fact ordinary issues faced by arbitrators regularly. In any event, a determination of the person who is actually in breach of contract and whether there is fundamental breach are questions of fact. The entitlement of the plaintiff to his claim was a question of law. However, it was an ordinary issue within the competency of the arbitrator and did not form a substantial and principal part of the claim to warrant the matter to be heard by the court (see pp 671C–D, 672C–D).

(4) Under s 6 of the Arbitration Act 1952, waiver occurs when there is some positive act which shows an intention to proceed with the action and not a mere intention to do so. Thus, following the analogy provided by s 6, the distinct act necessary to constitute waiver on the part of a claimant is the act of commencing the proceeding itself and not his intention of doing so. Accordingly, the notice of demand was not a distinct act and thereby did not amount to a waiver, as it was only an intention to commence proceedings (see p 673C–E).

(5) Section 20(2) of the Specific Relief Act 1950 in actual fact reinforces arbitration as an alternative method of dispute resolution. If a contract to refer a controversy to arbitration can be enforced specifically, then the arbitration clause will lose its object and purpose, as the dispute will end up being resolved in the court with the result that the very foundation of the Arbitration Act 1952 will crumble. It will amount to the court substituting its own machinery for the machinery which has been agreed on by the parties as authorized by the Act. Thus, the role of s 20(2) is to ensure that such contracts are not subject to specific performance so as to ensure that the arbitration clause is complied with. Section 20(2) therefore does not prohibit a party from enforcing his contractual right by arbitration where there is provision for such a course (see p 674E–G).

**[Bahasa Malaysia summary**

Plaintif dan defendan tersebut telah memasuki perjanjian ('perjanjian tersebut') untuk pembinaan padang golf. Perjanjian tersebut mengandungi peruntukan-peruntukan untuk menimbang tara dan

juga penamatannya. Melalui satu surat bertarikh 21 November 1996, defendan telah memberikan plaintif notis penamatan perjanjian tersebut. Defendan telah memberitahu plaintif bahawa defendan mempunyai tuntutan yang besar terhadap plaintif untuk pemecahan kontrak. Kemudian plaintif mencadangkan bahawa seorang penimbang tara tunggal dilantik untuk menimbang tara pertikaian tersebut yang timbul di antara pihak-pihak menurut fasal 14 perjanjian tersebut. Defendan telah memberitahu plaintif bahawa pertikaian tersebut melibatkan isu-isu undang-undang dan suatu forum yang sesuai untuk mendengar pertikaian tersebut adalah di mahkamah. Plaintif telah bermula melantik seorang penimbang tara. Tetapi prosiding timbang tara dihentikan sehingga penjelasan kedudukan selesai. Plantif telah memohon kepada mahkamah untuk satu deklarasi bahawa ia berhak untuk merujuk pertikaian tersebut kepada penimbang tara menurut fasal 14 perjanjian tersebut. Defendan telah berhujah, antara lain: (i) selepas satu perjanjian ditamatkan melalui persetujuan kedua-dua pihak, mereka tidak boleh bergantung kepada terma-terma di dalam kontrak; (ii) plaintif telah melepaskan haknya untuk menimbang tara dengan mengeluarkan notis tuntutan kepada defendan yang menyatakan suatu saman akan dikeluarkan jika defendan gagal untuk menyelesaikan jumlah yang dituntut; dan (iii) permohonan oleh plaintif adalah satu cubaan olehnya untuk mendesak haknya untuk menguatkuasakan fasal 14 perjanjian tersebut yang dihalang oleh s 20(2) Akta Relif Spesifik 1950.

**Diputuskan**, membenarkan permohonan:

(1) Fasal menimbang tara masih berterusan bagi tujuan mengukur tuntutan yang timbul daripada pemecahan oleh kerana ia adalah cara untuk menyelesaikan tuntutan yang dipersetujui oleh pihak-pihak sekiranya berlaku suatu pertikaian. Bahasa di dalam fasal 14 perjanjian tersebut adalah cukup luas utnuk meliputi sebarang pemecahan selagi tuntutan dan pertikaian boleh ditanggung berikutan pemecahan tersebut. Oleh itu, fasal menimbang tara masih berkuatkuasa dalam mengira ganti rugi yang timbul melalui persetujuan di dalam kes ini, oleh kerana terdapat liabiliti berkenaan pemecahan dan tanggungjawab yang telah dilaksanakan. Sebenarnya, defendan tidak mempertikaikan beberapa bahagian tuntutan plaintif. Oleh itu, penamatan perjanjian tersebut tidak mengganggu operasi fasal 14 (lihat ms 669D–F); *Heyman & Anor v Darwin Ltd* [1942] AC 356 diikut.

(2) Plaintif telah mematuhi keperluan di dalam s 9 Akta Timbang Tara 1952 dalam pelantikan penimbang tara tunggal. Oleh kerana bidang kuasanya untuk mendengar pertikaian tersebut dicabar, perkara tersebut adalah betul untuk dibawa ke mahkamah (lihat ms 670C–D).

(3) Seorang penimbang tara diberi kuasa untuk menentukan persoalan-persoalan undang-undang. Suatu pertikaian hanya

patut didengar oleh mahkamah jika persoalan undang-undang yang terlibat adalah banyak dan rumit. Di dalam kes ini, persoalan-persoalan undang-undang adalah pada hakikatnya merupakan isu-isu yang biasa yang sering dihadapi oleh seorang penimbang tara. Walau bagaimana pun, penentuan siapa yang telah memecah terma kontrak dan sama ada terdapat pemecahan asas adalah persoalan-persoalan fakta. Hak plaintif kepada tuntutannya merupakan persoalan undang-undang. Tetapi ia adalah suatu isu yang biasa di dalam kecekapan penimbang tara dan tidak membentuk sebahagian besar atau utama tuntutan yang memberikan alasan untuk membawa perkara tersebut untuk didengar oleh mahkamah (lihat ms 671C–D, 672C–D).

(4) Di bawah s 6 Akta Timbang Tara 1952, penepian berlaku apabila terdapat tindakan positif yang menunjukkan niat untuk meneruskan tindakan dan bukan hanya niat untuk berbuat demikian. Oleh itu, menurut analogi yang diperuntukkan dalam s 6, tindakan jelas yang diperlukan untuk terjumlah kepada pelepasan di pihak menuntut adalah tindakan memulakan prosiding itu sendiri dan bukan niat untuk berbuat demikian. Oleh itu, notis tuntutan bukan suatu tindakan jelas dan oleh itu tidak terjumlah kepada pelepasan, oleh kerana ia adalah hanya suatu niat untuk memulakan prosiding (lihat ms 673C–E).

(5) Seksyen 20(2) Akta Relif Spesifik 1950 pada hakikatnya memperkukuhkan timbang tara sebagai cara alternatif untuk menyelesaikan pertikaian. Jika suatu kontrak untuk merujuk suatu pertikaian kepada timbang tara boleh dikuatkuasakan secara spesifik, fasal timbang tara akan hilang matlamat dan tujuannya, kerana pertikaian tersebut boleh diselesaikan di dalam mahkamah dengan mengakibatkan dasar Akta Timbang Tara 1952 roboh. Ia akan terjumlah kepada mahkamah, menggantikan dengan caranya sendiri, cara yang dipersetujui oleh pihak-pihak seperti yang diberi kuasa oleh Akta tersebut. Oleh itu, peranan s 20(2) adalah untuk memastikan bahawa kontrak-kontrak adalah tidak tertakluk kepada pelaksanaan spesifik untuk memastikan bahawa fasal timbang tara dipatuhi. Oleh itu, s 20(2) tidak menghalang satu pihak untuk menguatkuasakan hak kontraknya melalui timbang tara di mana terdapat peruntukkan untuk hala yang sedemikian (lihat ms 674E–G).]

## Notes

For cases on reference of dispute, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 715–716.

## Cases referred to

*Austin & Whiteley Ltd v Bowley & Sons* (1913) 108 LT 921 (refd)
*Brighton Marine Palace Pier Ltd v Woodhouse* [1893] 2 Ch 486 (refd)

*Chua Gim Bee & Anor v Asia Insurance Co Ltd* 4 MC 314 (refd)
*Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 (refd)
*Golodetz v Schrier* (1947) 80 LI L Rep 647 (refd)
*Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20 (refd)
*Heyman & Anor v Darwins, Ltd* [1942] AC 356 (folld)
*Jureidini v National British and Irish Millers Insurance Co Ltd* [1915] AC 499 (refd)
*Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871 (refd)
*Lee v Showmen's Guild of Great Britain* [1952] 1 All ER 1175 (refd)
*Pilcher v Rawlins* (1872) 7 LR Ch App 259 (refd)
*Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151 (refd)
*Rowe Brothers & Co Ltd v Crossley Brothers Ltd* [1911-13] All ER Rep 801 (refd)
*Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 (refd)
*Swee Pte Ltd v Lim Kian Chai & Anor* [1983] 1 MLJ 353 (refd)
*Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9 (refd)

**Legislation referred to**

Arbitration Act 1952 ss 6, 9, 12, 14, 22
Contracts Act 1950 s 40
Specific Relief Act 1950 s 20(2)

*FH D'Cruz* with *Sheena M Sinnappah* (*Ho & Co*) for the plaintiff.
*KK Chong* (*Koh Kim Leng & Co*) for the defendant.

**Augustine Paul JC**: The substantial issue for determination in this originating summons is the right of a claimant to declaratory relief to refer a dispute arising from an arbitration agreement to arbitration. All references to exhibits in this judgment shall be references to exhibits annexed to the affidavit accompanying the application of the plaintiff. The Arbitration Act 1952 shall hereafter be referred to as 'the Act'.

On 12 August 1996 the plaintiff and the defendant entered into an agreement ('the agreement') for the construction of a golf course. The agreement contained provisions for arbitration and its termination. The relevant clauses are as follows:

ARBITRATION

14 If any dispute or difference shall arise between the parties hereto touching any cause matter or thing herein contained or the operation or construction thereof or any matter or thing in any way connected with this Agreement or the rights duties or liabilities of either party under or in connection with this Agreement then and in every such case the dispute or difference shall be referred to a single arbitrator if the parties agree upon one or otherwise to two arbitrators one to be appointed by each

party and in either case in accordance with and subject to the provisions of the Malaysian Arbitration Act 1952 or any statutory modification or re-enactment thereof for the time being in force and such arbitration shall be held in Kuala Lumpur or in such other place as the parties shall mutually agree.

TERMINATION

15 Notwithstanding any provision to the contrary anywhere set out in this Agreement hereof in the event the Contractor shall:

(a) breach any condition or commit any default of any provisions of this Agreement;

(b) fail to comply with written instructions of the Employer after several warning;

(c) suffer or allow a petition for winding up to be presented against the Contractor;

(d) fail to complete the works in accordance with the First Working Programme Schedule and/or Second Working Programme Schedule and/or Third Working Programme Schedule as set out in the Second Schedule;

then and in any such event the Employer shall be entitled to terminate this Agreement and engage new contractors to complete the contract works still outstanding. All cost incurred as a result of the Employer having to engage new contractors to complete the contract works shall be borne by the Contractor.

By letter dated 21 November 1996 (Exhibit B) the defendant gave the plaintiff notice of termination of the agreement. The material parts of the letter read as follows:

*Re: Termination of the Agreement fated 12 August 1996 between Ornaconstruction Corp Sdn Bhd and Yip Chee Seng & Sons Sdn Bhd for the Construction and Completion of the proposed 27 Holes Golf Course at Gapam Melaka for Ornaresort Bhd*

We refer to the above matter and the inspection held on 16 November 1996 wherein you have been informed that the hand-over of Hole 10 to 18 of Ornaresort Golf Course has been rejected for reasons as stated in our list of defective and incompleted work.

We note with regret that you have failed to comply with our written instructions after several warnings and failed to complete the works in accordance with the First Working Programme Schedule as set out in the Second Schedule of the above agreement.

We hereby give you NOTICE that the above Agreement is to be terminated with immediate effect and you are to have all your equipment, plant and tools removed from the construction site within SEVEN (7) DAYS from the date of this notice, failing which we shall not be responsible for any loss or damage to your equipment, plant and tools.

Further, you are to get all your workers and personnel out of the construction site failing which they will be deemed as trespassers and we shall not be responsible for any injuries to their persons.

The plaintiff accepted the repudiation of the agreement by its letter dated 27 November 1996 (exh C) the material parts of which read as follows:

*Re: Agreement dated 12 August 1996 between yourselves and Yip Chee Seng & Sons Sdn Bhd*

We act on behalf of Yip Chee Seng & Sons Sdn Bhd and write with reference to your letters dated 21 November 1996 and 26 November 1996.

Our Clients stand by the contents of the second and third paragraphs of their letter of 21 November 1996 to you. Nevertheless, as you have clearly shown an intention no longer to be bound by the abovecaptioned agreement our Clients are agreeable to accept your repudiation of the said agreement. Such acceptance does not amount to any admission of liability on the part of our Clients hence you shall still be liable to pay our Clients all payments already due to our Clients for which statements had been rendered to you, in addition our Clients reserve the right to claim for all loss and damage suffered by them due to your delay in payment to them loss of profits and loss of reputation. You are also to take over all balance of materials already purchased by our Clients prior to your repudiation for affixation at the site but which have not been affixed yet.

We believe our Clients have already notified you to conduct a joint inspection with them tomorrow to ascertain the amount of work done since the last progress claim rendered to you. If you fail to conduct the said joint inspection with our Clients tomorrow our Clients shall have no alternative but to conduct the necessary inspection on their own and a claim shall be rendered to you accordingly.

Lastly, we place on record that your requirement for our Clients to remove all their machinery and other items on site by tomorrow (28 November 1996) is unreasonable bearing in mind the kind of heavy machinery involved requiring the use of low-loaders to transport them out of the site. Our Clients having accepted your repudiation of the said agreement have no intention to remain on the site any longer than necessary, however a sufficient amount of time would be required to totally remove all their machinery and equipment.

By its letter dated 19 May 1997 (exh E) the plaintiff made a claim for RM3,590,548.16 from the defendant arising from the termination of the agreement. In their letter dated 9 July 1997 (exh F) the defendant said:

Our clients instruct us that they do not at all agree to items ii, iii and iv of your said letter and as intimated to you earlier, our clients have substantial claim for damages that they wish to make against you for your breach of contract.

Our clients are however agreeable on strictly Without Prejudice basis, to meet up with you to finalize your claim for contract sum with a view to amicably settle this whole matter if at all possible.

Kindly let us or our clients know whether you wish to meet them and if so, the time and date that you are free to call on them.

Then by its letter dated 25 June 1997 (exh D-1) the plaintiff notified the defendant of the particulars of its claim which are as follows:

(a) RM1,788,499.77 being balance of payment of works done in respect of the agreement;

(b) RM37,906.10 being damages incurred due to delay in payments outstanding;

(c) RM1,094,874,23 being loss of profit; and

(d) RM669,268.08 being direct expenses incurred.

Exhibit D-1 concluded with the following words:

> TAKE NOTICE that if you fail and/or refuse to remit full payment of the above sums to our clients direct or to us as their solicitors within the stipulated time frame, our instructions are that, our clients shall treat this as a dispute to be referred to arbitration in accordance with cl 14 of the said contract.

By its letter dated 10 July 1997 (exh G) the plaintiff informed the defendant that the contents of exh F show that

> .... a dispute has arisen between the parties concerned and as such we shall have the same referred to arbitration in accordance with cl 14 of the said contract.

Accordingly, by letter dated 15 July 1997 (exh H) the plaintiff suggested that a sole arbitrator be appointed to arbitrate the dispute that had arisen and proposed the names of two retired judges for consideration. The material parts of the letter read as follows:

> We refer to our letter dated 25 June 1997 to your clients and to our letter dated 10th July 1997 to you wherein we had stated that in view of the contents of your letter dated 9th July 1997 addressed to our clients, disputes have arisen between our clients and your clients.
>
> We are instructed by our clients to refer the disputes to arbitration in accordance with cl 14 of Contract dated 12August 1996 between your clients and our clients in respect of project known as 'Construction and Completion of the Proposed 27 Holes Golf Course at Gapam, Melaka for Ornaresort Bhd'.
>
> In compliance with the said Clause we hereby propose that a sole arbitrator be appointed to arbitrate the disputes that have arisen between the parties concerned and hereby append below the names of two prominent retired Judges (High Court and Supreme Court respectively) for your clients' consideration:-
>
> (a) Mr Justice Tuan Richard Talalla (Rtd).
>
> (b) Mr Justice Dato' George Seah (Rtd).
>
> We are of the view that as the nature of the disputes is purely contractual, the abovenamed are suitable arbitrators.

The defendant was of the view that as the dispute involved legal issues the proper forum to resolve the dispute was a Court of Law. It communicated its stand to the plaintiff by its letter dated 26 July 1997 (exh I) the material parts of which read as follows:

> We do agree with you that the nature of the dispute is purely contractual and as such it involves mainly legal issues. We are therefore of the respectful view that the proper forum to hear and decide such legal issues should be the court of Law and not by Arbitrator(s).
>
> We also confirm that we are agreeable to waive the effect of cl 14 of the Contract Agreement dated 12th August 1996 should you be agreeable to refer the matter to Court.
>
> Please let us have your early response hereto.

A The plaintiff's response to exh I is exh J dated 30 July 1997 the material parts of which read as follows:

> We refer to your letter dated 26 July 1997 contents whereof have been noted but regret to note that you have not replied specifically to the contents of our letter dated 15 July 1997.
>
> B We shall be most grateful if you could furnish us with a reply to our said letter.
>
> If we do not hear from you within fourteen (14) days from the date hereof, we shall assume that your clients are not agreeable to our client's proposal that a sole arbitrator be appointed to arbitrate the disputes that have arisen between the parties concerned and as such, we shall proceed to appoint
> C an arbitrator of our clients' choice and your clients shall appoint an arbitrator of their choice in accordance with Clause 14 of the Contract dated 12 August 1996.

The defendant's reply is exh K dated 12 August 1997 where it was stated that it preferred the matter to be referred to a Court of Law and accordingly
D was agreeable to waive the effect of cl 14 of the agreement. In the premises, the letter goes on to say:

> Kindly take note that we disagree to have the matter refer (*sic*) to Arbitration and therefore the question of appointing of Arbitrator(s) should not arise.

The plaintiff proceeded with the appointment of an arbitrator and
E requested the defendant to similarly do so by its letter dated 13 August 1997 (Exhibit L) the material parts of which read as follows:

> We refer to the above matter and to your letter dated 12 August 1997.
>
> In accordance with Clause 14 of the Contract dated 12 August 1996, we hereby appoint Mr. Khoo Choong Keow of M/s C.K. Khoo, No. 2B, Jalan Measure 1, Taman Measure, 40150 Shah Alam, Selangor as our client's
> F choice of Arbitrator.
>
> Mr. Khoo Choong Keow is a qualified Engineer by profession and has vast experience in matters pertaining to arbitration.
>
> Kindly revert with your clients' choice of Arbitrator in compliance with Clause 14 of the said Contract.

G In reply to Exhibit L the defendant, by its letter dated 22 August 1997 (exh M), resisted the reference to arbitration. The material parts of the letter read as follows:

> Your letter of 13 August 1997 refers.
>
> We note that your letter of 13 August 1997 clearly contradicts the basis
> H of your choice of arbitrator as stated in your early letter of 15 July 1997.
>
> Our clients maintain that the proper forum should be the court of Law for reasons as stated in our letters of 26 July 1997 and 12 August 1997.
>
> We have instruction to resist your clients' attempt to refer the matter for arbitration rather than for disposal by the court.

I Accordingly the plaintiff appointed Mr Khoo Choong Keow as the sole arbitrator ('the sole arbitrator') by its letter to him dated 11 September 1997 (exh N) the material parts of which read as follows:

> We refer to the above matter and to our letter dated 13 August 1997 addressed to M/s Koh Kim Leng & Co., solicitors for the abovenamed Respondent, a copy of which was carbon copied to your goodself.
>
> We write to inform you that the abovenamed Respondent's solicitors have failed to revert with their client's choice of Arbitrator in compliance with cl 14 of the Contract dated 12 August 1996 and within twenty-one (21) days as required by s 9 of the Arbitration Act 1952.
>
> As such, in accordance with s 9 of the Arbitration Act 1952, our client hereby appoint your goodself to act as sole arbitrator in the above arbitration proceedings.
>
> We enclose herewith the following documents for your attention and further action:
>
> (a) Contract dated 12 August 1996 highlighting cl 14 thereof;
>
> (b) Letter dated 13 August 1997 addressed to M/s Koh Kim Leng & Co., solicitors for the abovenamed Respondents from us;
>
> (c) s 9 Arbitration Act 1952.

By a letter of even date (exh O) the plaintiff informed the defendant of the appointment of the sole arbitrator. The sole arbitrator then took steps to proceed with the arbitration by fixing a date for a preliminary meeting. By its letter dated 17 October 1997 (exh Q) the defendant informed the sole arbitrator that it strongly objects to refer the matter to arbitration as the dispute involves questions of law and, accordingly, the proper forum to adjudicate should be the court. This prompted the sole arbitrator to inform both parties by letter dated 31 October 1997 (exh R) that he was withholding proceedings pending clarification of the position. The material part of his letter reads as follows:

> counsel for Respondent has raised issue on the proper forum for dispute resolution, citing correspondence between the Parties of which I have no knowledge. Under the circumstances I would withhold proceedings pending clarification of the situation by either or both Parties.

By its letter dated 3 November 1997 (exh S) the plaintiff requested the sole arbitrator to proceed with the hearing of the arbitration. In another attempt to stop the arbitration proceeding the defendant notified the sole arbitrator by its letter dated 11 November 1997 (exh T1) that the plaintiff had waived its right to arbitration and had chosen to refer the dispute to the court of Law. The material parts of the letter read as follows:

> We refer to the above matter and your letter of 31 October 1997.
>
> We write to inform you that the Agreement dated 12 August 1996 signed between Ornaconstruction Corp Sdn Bhd and Yip Chee Seng & Sons Sdn Bhd for the construction and completion of the proposed 27 holes golf course at Gapam, Melaka for Ornaresort Bhd (hereinafter referred to as the 'said Agreement') has been duly terminated vide our clients' letter of 21 November 1996 to the Claimant. As such cl 14 of the said agreement is no longer applicable to the parties.
>
> Thereafter the Claimant through their former Solicitors Messrs Khong & Son in their letter dated 6 January 1997 to our clients, the contents in para 3 of the letter of which expressly waived the effect of cl 14 of the said Agreement and chose to refer — the matter to the court of Law in their sentence which read:

A We shall have no alternative but to cause a Summons to be issued against you for the recovery of the same without further reference to you.

The sole arbitrator by his Letter dated 17 November 1997 (exh U) informed both parties that he has no power to decide on the issue of jurisdiction and was staying proceedings pending reference of the matter to B court. The material parts of the letter read as follows:

I refer to the following:

(i) Letter from M/s Ho & Company SS/YCSS/313-1/97 dated 3 November 1997;

(ii) Letter from M/s Koh Kim Leng & Co TLK/SC/14524/96 dated C 11 November 1997.

The Parties take issue on the proper forum for resolution of the dispute, viz:, whether it should be by litigation or arbitration.

On the face of the abovementioned submissions, it appears that I am not empowered to rule on this issue. The following courses of action are now D open:

(1) Claimant could apply to the court for a ruling;

(2) The arbitration may be convened and Respondent could apply to the court for a ruling and a stay of arbitration pending such ruling.

By the circumstances that I am so far given to understand via the Parties' E letters as abovementioned, I am inclined to believe that the practical option could be only (1) above.

I would be pleased to hear the view of the Parties within 7 days of this letter. Meanwhile the meetings scheduled for 21 November 1997 is cancelled.

F In the light of the foregoing the plaintiff felt compelled to apply to this court for a declaration that it is entitled to refer the dispute that it has with the defendant to arbitration in accordance with cl 14 of the agreement.

At the hearing before me both parties agreed to confine their arguments to the following issues:

G

(a) whether the termination of the agreement affects the operation of cl 14;

(b) the status of the sole arbitrator appointed by the plaintiff under the Act;

H (c) whether the description of the dispute as a 'contractual dispute' by the defendant requires a reference to court;

(d) whether there is a waiver of cl 14 by the plaintiff pursuant to its letter dated 6 January 1997; and

(e) whether the present application is justiciable by this court and, if so, I the manner in which the discretion should be exercised.

I shall now address the issues presented to me in the light of the submissions made by both parties.

(a) *Whether the termination of the contract affects the operation of cl 14*

In his submission learned counsel for the plaintiff contended that the repudiation of a contract does not mean that a party cannot rely on any of its terms. He said that it only means that the obligations of parties need not be performed and that rights and remedies that have accrued remain. In support of his argument he referred to s 40 of the Contracts Act 1950 and the Federal Court case of *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9. In that case MacIntyre J said at p15:

> When a contract is rescinded under s 40 two consequences follow. According to s 65 'when a party at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit so far as may be, to the person from whom it was received'.

Learned counsel then referred to *Heyman & Anor v Darwins Ltd* [1942] AC 356 as authority for the proposition that the repudiation of a contract does not affect the operation of the arbitration clause contained in it. Accordingly, he concluded, the repudiation of the agreement does not affect Clause 14. In his reply learned counsel for the defendant contended that once an agreement has been terminated by the consent of both parties they can no longer rely on the terms of the contract. In support he referred to *Anson's Law of Contract* 26th Ed where it says at p 464:

> If the innocent party decides to accept the repudiation, this discharges all future contractual obligations on his part which have not already been performed. At the same time, the primary obligations of the party in default to perform any of the promises made by him in the contract and remaining unperformed are likewise discharged. However, in the case of the party in default, in place of the primary obligations imposed by the contract there arises a secondary obligation to pay damages for the breach. This point was clearly made in *Moschi v Lep Air Services Ltd* [1973] AC 331.

With regard to the plaintiff's reliance on *Heyman* learned counsel said that the principle in that case is confined to cases where there is frustration of the contract.

It is clear that the submission of the defendant on the obligation of parties arising from a contract that they had entered into following its repudiation is no different from that of the plaintiff's stand. Their rights and liabilities are as contained in the passage from *Anson's Law of Contracts* relied on by learned counsel for the defendant. It is therefore not necessary for me to go any further into this part of the submission of the parties.

The principal matter for deliberation in this issue is the effect of an arbitration clause in an agreement which has been repudiated. For a considerable period of time there has been some uncertainty as to whether the repudiation of a contract also puts an end to any arbitration clause in it. *The Law and Practice of Commercial Arbitration in England* by Mustill and Boyd (2nd Ed) poses the problem this way at p 110:

> The proposition that an arbitrator cannot rule on the *initial* existence of the contract from which his jurisdiction derives has never been seriously open to doubt. More troublesome is the question whether the arbitrator can award upon the *continued* existence of the contract. If one of the parties contends that something has happened to bring the contract to an end, how can the arbitrator effectively rule in his favour? For such a ruling would entail that at the moment when the arbitrator was appointed to decide the dispute there was no longer an agreement in existence under which he was empowered to decide anything at all.

This in effect involves the validity of an arbitration clause where the contract which contains it has, for some reason or another, come to an end. In *Jureidini v National British and Irish Millers Insurance Co Ltd* [1915] AC 499 Viscount Haldane LC said at p 505:

> Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.

In *Chua Gim Bee & Anor v Asia Insurance Co Ltd* 4 MC 314, Raja Musa J in commenting on *Jureidini* said at p 316:

> In that case there was a fire insurance policy in which the material clauses involved were two. The first provided that if any claim made under the policy were fraudulent or if the loss were occasioned by the willful act or with the connivance of the insured all benefit under the policy should be forfeited. The second provided that any difference as to the amount of any loss must be referred to arbitration and that an award was a condition precedent to any right of action upon the policy. Before action, the defendants repudiated the whole claim on the grounds of fraud and arson. When the action came to trial and when the court had negatived the fraud and arson, the defendants then relied on the arbitration clause. The House of Lords held that the repudiation by the defendants being upon a ground going to the very root of the contract precluded them from pleading the arbitration clause as a bar.
>
> The authority of *Jureidini*'s seems to me to come to this. Where there is an arbitration clause such as the one now before me, and the insurance company has repudiated its liability upon a ground which goes to the substance of the whole contract, it cannot be entitled to insist upon a subordinate term of the contract still being enforced - see the judgment of Viscount Haldane LC at p 505. The ground of repudiation being one that goes to the root, the whole contract is sought to be avoided in toto and with it the subordinate arbitration clause must accordingly go. It does not, however, go so far as to say that any repudiation of liability by the company will preclude it from pleading the arbitration clause as a bar.

In *Heyman* Viscount Simon LC said that if the dispute is as to whether the contract which contains the arbitration clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. His Lordship also said that similarly if one party to the alleged contract is contending that it is void ab initio the arbitration clause cannot operate, for on this view the clause itself is also void and added at pp 366–367:

But, in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of', 'with regard to,' or 'under' the contract, and an arbitration clause which uses these, or similar expressions, should be construed accordingly. ...

I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has 'come to an end,' as, for example, by frustration.

Lord Macmillan after having referred to the passage from *Jureidini* that I have set out earlier said in *Heyman* at p 373–374:

Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But, even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach or a breach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken. Now, in this state of matters, why should it be said that the arbitration clause, if the contract contains one, is no longer operative or effective? A partial breach leaves the arbitration clause effective. Why should a total breach abrogate it? The repudiation being not of the contract but of obligations undertaken by one of the parties, why should it imply a repudiation of the arbitration clause so that it can no longer be invoked for the settlement of disputes arising in consequence of the repudiation? I do not think that this is the result of what is termed repudiation. Suppose the injured party prefers to have his claim of damages for the other party's total breach assessed by arbitration, can he not invoke and enforce the arbitration clause for that purpose? Can he be effectually met by a plea on the part of the wrongdoer that the wrongdoer has repudiated the contract and with it the arbitration clause which is consequently no longer operative? I do not think that this result follows even if the injured party acquiesces in the total breach - accepts the repudiation, as it is put — and contents himself with his claim of damages. I think he is entitled to insist on having his damages assessed by arbitration notwithstanding the other party's repudiation.

I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other hinc inde, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically

enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement. Moreover, there is the further significant difference that the courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts.

I am, accordingly, of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.

Mustill and Boyd say at p 110 that the ratio decidendi of *Heyman* lies in the distinction between the arbitration clause and the remaining provisions of the contracts as stated by Lord Macmillan. I agree, respectfully, with the reasoning in *Heyman* that the arbitration clause survives for the purpose of measuring the claims arising out of the breach as that is the mode of settling claims agreed by the parties in the event there is a dispute.

The language of cl 14 of the agreement is wide enough to cover any form of breach so long as a claim or dispute can be sustained following the breach. The arbitration clause therefore survives for measuring the damages arising out of the repudiation by consent in this case as there is liability in respect of the breach and obligations that have been performed. As a matter of fact the defendant did not dispute certain parts of the claim of the plaintiff as shown in exh F. Thus the termination of the agreement does not affect the operation of cl 14. The passages from *Heyman* that I have reproduced show that the principle that it enunciates is not confined to cases where there is frustration of the contract as contended by learned counsel for the defendant.

(b) *The status of the sole arbitrator appointed by the plaintiff under the Act*

In his submission learned counsel for the plaintiff said that the appointment of an arbitrator must be in accordance with cl 14 of the agreement which is subject to the provisions of the Act. He said that under the clause the parties may appoint a single arbitrator by consent failing which each party may appoint one. If the latter method of appointment fails then s 9 of the Act becomes applicable. He then referred to exh H which is a request for the appointment of a single arbitrator by consent. As there was no response the plaintiff gave notice of intention by exh J to appoint his arbitrator and asked the defendant to appoint his own. As the defendant refused to do so by exh K the plaintiff appointed the sole arbitrator by exh L. As the statutory period of 21 days had expired the plaintiff appointed the sole arbitrator as arbitrator by exh N. Notification of his appointment was given to the defendant by exh O. It will therefore be seen that the submission of the

plaintiff is confined to the legality of the appointment of the sole arbitrator. In his reply learned counsel for the defendant merely referred to *Chitty on Contracts* (27th Ed) p 724 which reads as follows:

> Where a respondent in arbitration proceedings challenges the jurisdiction of the arbitrator to determine the subject-matter of the dispute, the arbitrator may adopt one of two courses. He may refuse to deal with the question of jurisdiction, leaving the parties to raise it in court either before or after the award is published. Alternatively, he may decide the question himself, proceeding with or abandoning the arbitration in accordance with his decision. He cannot, however, make any decision or award on this question which is binding on the parties, for he has no power to determine his own jurisdiction.

Apart from referring to this passage which deals only with a challenge to the jurisdiction of the arbitrator learned counsel for the defendant did not proceed to raise any argument on the validity of the appointment of the sole arbitrator as clearly contemplated by this issue and as seen from the correct stand taken by the plaintiff. In any event I am satisfied that the plaintiff has complied with the requirements of s 9 of the Act in the appointment of the sole arbitrator. As there is a challenge to his jurisdiction to hear the dispute the matter is now rightly before the court in accordance with the passage relied on by learned counsel for the defendant. I shall deal with this aspect of the case in a later part of the judgment. In my opinion, therefore, this issue requires no further consideration.

(c) *Whether the description of the dispute as a 'contractual dispute' by the defendant requires a reference to court*

After an initial difference of opinion between the parties on the meaning of the phrase 'contractual dispute' this issue finally focused on the jurisdiction of an arbitrator when the dispute involves a question of law. In his submission learned counsel for the plaintiff relied on *Lee v Showmen's Guild of Great Britain* [1952] 1 All ER 1175 to argue that an arbitrator has jurisdiction over questions of law. In his reply, learned counsel for the defendant relied on *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 and *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20 to say that a question of law is not suitable to be decided by arbitration and that the dispute should properly be decided by the court. He also referred to *Chitty on Contracts* (27th Ed) which says at p 730:

> It was sometimes said that a stay might be refused if the principal issue is a question of law or of the true construction of the contract, as the question was likely to return to the court upon a case stated by the arbitrator. But this reasoning no longer applies since the abolition of the procedure by way of case stated. However, the fact that an important question of constitutional law was involved in a dispute has been held sufficient ground for refusing a stay. The usual practice is to grant a stay if the dispute involves difficult questions of fact, even if it also involves questions of law and even if the issues are particularly appropriate for trial in the commercial court. Of course, there is nothing to prevent the parties from submitting a pure question of law to an arbitrator if they so desire.

Learned counsel said that the questions of law that are involved in this dispute are a determination of the person actually in breach of the contract, whether there is a fundamental breach and whether the plaintiff is entitled to the claim for loss of profits.

The phrase 'question of law' is defined in *Butterworths Australian Legal Dictionary* as:

> A question to be resolved by applying legal principles, rather than by determining a factual situation; an issue involving the application or interpretation of law and reserved for a judge.

Section 22(1) of the Act provides that an arbitrator may, and shall if so directed by the High Court, state any question of law arising in the course of the reference for the decision of the High Court. Thus, an arbitrator is empowered to determine questions of law. It follows that it is not every point of law arising in an arbitration proceeding that may warrant the matter to be stated to the High Court for its decision. The High Court will obviously order a case to be stated for its decision only if it is satisfied that it is more appropriate for it to determine the point of law than the arbitrator. the court will have in mind the fact that as the parties have agreed to resolve any dispute by arbitration it must be slow in taking over the hearing of the dispute merely because it involves a point of law. After all the point of law can be determined by way of a case stated if the need arises. That is the precise function of s 22 of the Act. In my opinion therefore a dispute should be heard by a Court on this ground only if the point of law involved is substantial and complex and not merely on the ground that it may come back to the High Court by way of case stated. In this regard Lord Wright said in *Heyman* at p 389:

> The judge seems to rely on the language which he quotes from Lord Parker in *Bristol Corp v John Aird Ltd* [1913] AC 241, to the effect that: Everybody knows that, with regard to the construction of an agreement, it is absolutely useless to stay the action, because it will only come back to the court on a case stated. Any expression of opinion falling from that great judge must receive the most careful consideration, but it would not be safe to tear it from its context and give it a general application. I need not quote authorities for what has been said so often, that under a general submission, the arbitrator is appointed to decide issues both of fact and of law. In the background, indeed, is the court's discretion to set aside an award if it is bad in law on its face, and the opinion of the court on issues of law may be invoked by means of cases stated under the Acts of 1889 and 1934 but if the submission is general, it will require some substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it includes both fact and law or is limited to either fact or law. In the present case I can find no sufficient reason. The dispute is of the most ordinary character.

Mustill and Boyd say at p 477:

> The weight to be attached to the consideration that the matters in dispute include questions of law has been much discussed. The reported cases are not in accord. The current position is probably that the presence of an issue or issues of law is not in itself a decisive ground for refusing a stay, unless perhaps

> they are the only issues in dispute, but that it is a matter to be weighed with other considerations in the exercise of the discretion. The logic of this distinction may not be compelling, but it makes practical sense.
>
> The parties must be taken to have foreseen, when they agreed to have their disputes resolved by arbitration, that the disputes might involve questions of law as well as of fact; and a skilled arbitrator might be just as successful in resolving a dispute involving both types of issue as a Judge of the High Court.

It is pertinent to refer to *Rowe Brothers & Co Ltd v Crossley Brothers Ltd* [1911-13] All ER Rep 801, Hamilton LJ said at p 809:

> ... it is quite as difficult to make the lawyer understand engineering so as to make the engineer understand the law.

In my opinion what learned counsel asserts as being points of law justifying the court to hear the dispute are in fact ordinary issues faced by arbitrators regularly. In any event a determination of the person who is actually in breach of the contract and whether there is a fundamental breach are questions of fact. I agree that the entitlement of the plaintiff to his claim for loss of profit is a question of law. However, it is an ordinary issue within the competency of the arbitrator and does not form a substantial and principal part of the claim to warrant the matter to be heard by the court.

(d) *Whether there is a waiver of cl 14 by the plaintiff pursuant to its letter dated 6 January 1997*

In its letter dated 6 January 1997 the plaintiff in demanding for the sum due to it from the defendant said in the last paragraph:

> TAKE NOTICE that unless you do make arrangements to have the sum settled to our clients directly or to us as their solicitors within 14 days of date hereof, we shall have no alternative but to cause a Summons to be issued against you for the recovery of the same, without further reference to you.

Learned counsel for the defendant contended that this notice amounted to waiver of the plaintiff's right to arbitration. Learned counsel for the plaintiff said that the primary intention of the plaintiff was arbitration as reflected by the subsequent correspondence and as such there was no waiver of the right.

Waiver is a doctrine of some arbitrariness introduced by the law to prevent a person in certain circumstances from taking up two inconsistent positions (see *Pilcher v Rawlins* (1872) 7 LR Ch App 259). It actually connotes election (see *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871). In *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 Isaacs J said that some distinct act ought to be done to constitute a waiver; next, it must be intentional, that is, such as either expressly or by imputation of law indicates intention to treat the matter as if the condition did not exist or as if the forfeiture or breach of condition had not occurred; and, lastly, it must be with knowledge. In my opinion the meaning and scope of the 'distinct act' that must have been done in order to constitute waiver may be gathered from s 6 of the Act. Waiver is recognised by that section though in a different context. That

section relates to proceedings commenced against a person who is a party to an arbitration agreement by the other party to it. It provides that such a person may apply to the court to stay the proceedings if he has not, inter alia, taken any other steps in the proceedings. If he has done so he is deemed to have waived his right to arbitration. In *Austin & Whiteley Ltd v Bowley & Sons* (1913) 108 LT 921, Ridley J said that what is intended by a step in the proceedings is some step which indicates an intention on the part of a party to the proceeding that he desires that the action should proceed and has no desire that the matter should be referred to arbitration. Thus appearing in chambers and asking for leave to defend has been held to be the taking of a step in the proceedings (see *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151) while a defendant's solicitors writing for further time to deliver defence has been held not to be steps in the proceedings (see *Brighton Marine Palace Pier Ltd v Woodhouse* [1893] 2 Ch 486). The argument on waiver on this issue, on the other hand, refers to a person who has given notice of his intention to commence proceedings as opposed to a person against whom proceedings have been commenced. The brief reference that I have made to s 6 of the Act shows that waiver occurs under that section when there is some positive act which shows an intention to proceed with the action and not a mere intention to carry do so. Thus following the analogy provided by s 6 of the Act the 'distinct act' necessary to constitute waiver on the part of a claimant is the act of commencing the proceeding itself and not his intention of doing so. Accordingly, the notice contained in the letter dated 6 January 1997 is not a distinct act and thereby does not amount to a waiver as it is only an intention to commence proceedings.

Be that as it may, the correspondence between the parties that I have set out in the early part of the judgment show that the question of waiver on the part of the plaintiff does not arise. After the letter dated 6 January 1997 was received by the defendant the plaintiff had repeatedly stressed its desire to go ahead with arbitration. In fact it was the defendant which was seeking to have arbitration waived in preference to a Court action. If in fact the plaintiff had waived its right to arbitration the question of the defendant attempting to waive it makes its present stand inconsistent and incomprehensible.

(e) *Whether the present application is justiciable by this court and, if so, the manner in which the discretion should be exercised*

In his submission learned counsel for the defendant contended that the application by the plaintiff is an attempt by it to exert its right to enforce Clause 14 of the agreement. This, he said, is prohibited by s 20(2) of the Specific Relief Act 1950 ('s 20(2)) which reads as follows:

> Save as provided by the law relating to civil procedure, no contract to refer a controversy to arbitration shall be specifically enforced.

In support of his argument he relied on *Swee Pte Ltd v Lim Kian Chai & Anor* [1983] 1 MLJ 353. In his reply learned counsel for the plaintiff said that this application merely seeks a declaration on the validity of the

appointment of the sole arbitrator. He added that this application is made pursuant to O 15 r 16 of the Rules of the High Court 1980 and as it is a rule relating to civil procedure the application comes within the ambit of s 20(2). A

It is my view that the answer to this issue is provided by *Swee Pte Ltd* relied on by the defendant. In that case Rhind J referred to the equivalent Brunei provision and said at p 357: B

> The particular part of the Specific Relief Enactment 1957 on which the plaintiff relies is the final sentence of s 20:
>
> > 'And, save as provided by the law relating to civil procedure in force in the State of Brunei no contract to refer a controversy to arbitration shall be specifically enforced.'
>
> Far from being a provision inconsistent with England's Arbitration Act 1950, that part of the Specific Relief Enactment 1957 just cited is no more than declaratory of what is in fact the common law of England on arbitration clauses. Paragraph 385 of 36 *Halsbury's* Law of England (3rd Ed) states: C
>
> > 'the court does not enforce the specific performance of agreements to refer to arbitration.'
>
> That same paragraph continues, though: D
>
> > 'An indirect method of enforcing performance of such an agreement is, however, provided by the Arbitration Act 1950 which gives the court discretion to stay an action in respect of any dispute which the parties have by writing agreed to refer to arbitration.'

E

Contrary to the argument advanced before me by both parties it is my view that s 20(2) in actual fact reinforces arbitration as an alternative method of dispute resolution. If a contract to refer a controversy to arbitration can be enforced specifically then the arbitration clause will lose its object and purpose as the dispute will end up being resolved in the court with the result that the very foundation of the Act will crumble. It will amount to the court F substituting its own machinery for the machinery which has been agreed on by the parties as authorised by the Act. Thus the role of s 20(2) is to ensure that such contracts are not subject to specific performance so as to ensure that the arbitration clause is complied with. In fact s 6 of the Act serves to complement this provision by enabling proceedings instituted in court to be stayed. Section 20(2) therefore does not prohibit a party from enforcing his G contractual right by arbitration where there is provision for such a course. Section 12 of the Act which authorises the court to appoint an arbitrator is in line with this argument.

It is perhaps necessary for me, at this stage, to comment on the propriety of the application made by the plaintiff. My first observation is H that the sole arbitrator could have proceeded with the hearing of the dispute as s 9 of the Act provides that pursuant to his appointment under this section, '.... his award shall be binding on both parties as if he had been appointed by consent.' If he had chosen that course he would have to warn the plaintiff that when he seeks to enforce the award he may be met with the answer that it is a nullity (see *Golodetz v Schrier* (1947) 80 LI L Rep 647). I This is for the reason that his appointment may be set aside. In this regard Mustill and Boyd say at p 575:

A If a question is raised on the jurisdiction of the arbitrator, either by a party or by the arbitrator himself, and if the objection is pressed, the arbitrator should see whether the parties will themselves take steps to obtain a final ruling on the question of jurisdiction — by seeking declaratory relief, or by empowering him to decide the matter himself, or to state a case upon it.

If the parties remain inactive, the arbitrator can choose between two B procedures:

1 to decide the question of jurisdiction himself, subsequently continuing or abandoning the arbitration according to what he decides; or

2 to set the question of jurisdiction to one side, leaving the parties to raise it in Court, either before or after the award has been published.

C Which course the arbitrator should adopt will depend on the circumstances. If the objection is straightforward, he may consider it better to rule at once, always bearing in mind that if either party is dissatisfied the matter can be reopened by the court. On the other hand, if the question of jurisdiction is difficult, or if the hearing on the merits is unlikely to be expensive, so that even a null award will not involve a great waste of costs, the arbitrator may think it D better to proceed with the reference, warning the claimant that he goes ahead at his peril.

However, generally an application relating to jurisdiction is made at an early stage seeking declaratory relief. The applicant is normally the respondent to the proposed arbitration. The proper procedure is for him to issue a writ or E originating summons, claiming a declaration that the arbitrator has no jurisdiction or power to act in the way proposed. It is not unusual for the claimant to make the application. As Mustill and Boyd say at p 572 (footnote no 8):

F There may be circumstances where the claimant, rather than the respondent, would wish to ask for a declaration as to jurisdiction, for example, if the respondent had indicated an objection to the jurisdiction which he was unwilling to put to the test until after the award.

On the power of the court to grant such a declaration Mustill and Boyd at pp 572-573:

G There is no doubt that the court has jurisdiction to grant such a declaration. But the relief is discretionary, and will not be granted automatically. the court will take into account, when deciding to allow the claim to proceed to trial:

1 the stage which the arbitration has reached when the objection is taken;

H 2 the time during which the arbitration will remain at a standstill whilst the question of jurisdiction is decided;

3 the degree to which, if the objection is upheld, it will dispose of the reference, and the amount of time and costs which will thereby be saved;

4 the degree to which it will be necessary to investigate facts — and in particular, facts which are in issue in the arbitration itself — in order to I decide the question of jurisdiction;

5 the extent to which the respondent runs the risk of hardship if the question of jurisdiction is postponed until after the award is made.

> Thus if a short question of construction will decide whether the agreement ever existed at all, or if the arbitrator was ever validly appointed, the court will be likely to entertain the claim; the more so, if the arbitration promises to be long and expensive. But if the answer to the question of jurisdiction will delay the reference, without substantially shortening the hearing, the court will probably think it better to leave the question over until it is seen whether, ultimately, the arbitrator grants the relief to which objection is taken. In such a case, the court will no doubt find a way of making it clear that the respondent can participate in the hearing without waiving his objection, and may also urge (although it cannot compel) the parties to make an ad hoc submission empowering the arbitrator to decide upon the question of jurisdiction.

In the light of my answers to the issues framed by the parties I allow the plaintiff's application with costs.

*Application allowed.*

Reported by Jafisah Jaafar